No. 79-527

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK JAMES JOCK AND HARRY ASHMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A41-42A) is not reported. The opinions of the district court (Pet. App. A5-A40) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1979. A petition for rehearing was de-

nied on August 8, 1979. On August 21, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 28, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment against petitioners was constructively amended at trial, or the evidence adduced by the government entailed a variance prejudicial to petitioners' ability to conduct a defense to the charges against them.

2. Whether the evidence was sufficient to show a use of interstate wire facilities in furtherance of the fraudulent scheme charged in the indictment.

3. Whether the district court abused its discretion in denying petitioners' motion for a new trial on the basis of newly discovered evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioners were convicted on one count of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), one count of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), and two counts of wire fraud, in violation of 18 U.S.C. 1343. In addition, petitioner

Jock was convicted on a third wire fraud count.[1] The district court granted petitioners' post-verdict motions for judgments of acquittal on the racketeering counts, one of the wire fraud counts on which both petitioners were convicted, and the wire fraud count on which Jock alone was convicted. The court sustained petitioners' convictions on the remaining wire fraud count (Pet. App. A5-A30). In a second opinion, rendered a month later, the district court denied petitioners' motion for a new trial based on newly discovered evidence (Pet. App. A31-A40). Petitioners were sentenced to four years' imprisonment. The court suspended all but three months of petitioner Ashman's sentence and directed that he be placed on probation for five years following his release from confinement (Pet. App. A1-A4). The court of appeals affirmed (Pet. App. A41-A42).

1. The evidence at trial is summarized in the district court's opinion on petitioners' post-verdict motions for judgments of acquittal (Pet. App. A5-A17, A20). Briefly, the evidence showed that petitioners operated Forte Oil Company in Atco, New Jersey, and that co-defendant Paul Scott, who pleaded guilty before trial (A. 180a-200a)[2] and was the government's

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[1] The jury acquitted petitioners on four wire fraud counts and also acquitted petitioner Ashman on the additional wire fraud count on which only petitioner Jock was convicted. The district court granted petitioners' motion for a judgment of acquittal on two counts of theft from an interstate shipment, in violation of 18 U.S.C. 659 (Pet. App. A6, A16).

[2] "A." refers to petitioners' appendix in the court of appeals.

primary witness against petitioners, was a truck driver for Paradee Oil Company in Dover, Delaware. The indictment alleged that in July and August 1977, Scott and petitioners participated in a scheme whereby Scott diverted to Forte several truck loads of fuel oil that his employer Paradee had instructed him to deliver elsewhere.[3] The wire fraud count on which petitioners now stand convicted alleged that on or about August 4, 1977, for the purpose of executing their fraudulent scheme, petitioners caused an interstate telephone call to be made between Delaware and New Jersey. Telephone company toll call records (Govt. Exhs. 17, 19) showed that on August 4, 1977, two calls were made from Scott's residence in Delaware to Ashman's residence in New Jersey. Scott testified that he placed the calls and that they related to the delivery of fuel oil to Forte on the following day, August 5, 1977 (Tr. 164-165, 216-219, 233).

2. When Scott testified at trial on July 13, 1978, defense counsel cross-examined him about any deliveries of stolen fuel he may have made during July and August 1977 to Dominick Fonte at the National Paving Company in Berlin, New Jersey, and to several other oil and gasoline companies in the Philadel-

[3] The scheme originated in July 1977, when Scott accompanied unindicted co-conspirator Randy Dickerson to Forte where Dickerson was applying for a job (Tr. 139-140, 575-577). When petitioner Jock discovered that Scott drove for Paradee, he asked Scott if he could obtain oil for Forte (Tr. 142-146, 209-210, 578). Thereafter, in response to telephone calls from Ashman, Scott began the deliveries (Tr. 145-161, 580-584).

phia-Camden area (Pet. App. A7-A10). Defense counsel also "introduced documents which suggested that Scott could not possibly have been diverting to Forte the fuel products which he had specified in his testimony and through his identification of government documents, * * * either because he was somewhere else at the crucial time or because he did not pick up that load until sometime after he testified that he had delivered it to Forte" (*id.* at A8-A9). As a consequence of this line of questioning, the government directed agents of the Federal Bureau of Investigation to conduct a further investigation, and, on the afternoon of the same day, July 13, 1978, FBI agents interviewed Dominick Fonte (*id.* at A10). Fonte said that Scott delivered fuel to him from June through July 21, 1977, and that he made one additional delivery on August 25, 1977 (2 Tr. 2).[4]

The government disclosed the results of its investigation at a morning conference on July 14, 1978. Counsel for petitioner Ashman stated that he thought he would need a continuance to develop the details of the Fonte story, and the district court indicated its willingness to grant such a continuance (Pet. App. A10; 2 Tr. 8). At a second conference that afternoon, the government provided defense counsel with the notes of the FBI agents' interview with Fonte. The prosecutor stated that Scott was being reinter-

[4] "2 Tr." refers to the transcript of the proceedings before the district court in chambers on July 14, 1978. "3 Tr." refers to the transcript of the proceedings before the district court at 4:40 p.m. on the afternoon of July 14, 1978.

viewed and that a copy of his statement would be given to petitioners later in the day (3 Tr. 2). The prosecutor also said that he intended to recall Scott as a witness the following morning, Saturday, July 15, 1978. The district court decided to postpone its ruling on petitioner Ashman's request for a continuance until after Scott had testified on redirect (3 Tr. 3-4).

The next day, Scott testified that, during his interview with the FBI the previous afternoon, he admitted that he had diverted other loads of fuel from Paradee in addition to the loads that he took to Forte (Tr. 790, 793-804). Scott explained that he did not admit these thefts earlier because he feared that his punishment would increase in proportion to the number of thefts discovered (Tr. 841).

Scott testified that he began stealing 100 to 200 gallons of fuel per week from Paradee in 1975 (Tr. 793-794). In the winter of 1976, Randy Dickerson offered to arrange customers for Scott (Tr. 793-794). In November and December of 1976, Scott delivered approximately four loads of fuel oil and one load of gasoline to an oil company and five loads of gasoline to two service stations in Camden, New Jersey (Tr. 794-798); in January 1977, he delivered six or seven loads of gasoline and one load of fuel oil to Shanahan Trucking Company in Camden (Tr. 799-800); he delivered eight or nine loads of fuel oil and one load of gasoline to Dominick Fonte in June and July 1977, and one additional load in August 1977 (Tr. 802-804, 836, 885, 897-898, 902, 918). Each of these

deliveries was arranged by Dickerson, who received half of the 20 to 30 cents per gallon that Scott was paid for the stolen fuel (Tr. 794-796, 798, 800, 802).

Scott continued to maintain that he made seven deliveries of petroleum products to Forte in July and August 1977. As the district court observed (Pet. App. A11), however, "some of the 'details' of those diversions were changed." With respect to the single wire fraud count on which the district court let petitioners' convictions stand, Scott had originally testified that his August 4 telephone calls to petitioner Ashman concerned an August 5 delivery (Tr. 164-165, 216-219, 233). In his testimony on redirect, however, Scott stated that a fuel oil invoice from the Getty Oil Company that he previously described as reflecting the load he took to Forte on August 5, 1977 (Govt. Exhs. 5a, 5b) did not in fact relate to that delivery because he always delivered gasoline, not fuel oil, to Forte (Pet. App. A11-A12; Tr. 859-860, 876-877). Asked whether he made a gasoline delivery to Forte on August 5, 1977, Scott stated that he "believe[d] that [he] made a delivery on that night * * * [although he was] not sure about the exact date" (Tr. 859).

At the close of Scott's testimony on redirect, counsel for petitioner Jock stated that, because of the sequestered jury, he would not move for a continuance but that he would begin his additional cross-examination immediately. Counsel reserved the right to recall Scott for further cross-examination on Monday, July 17 (Pet. App. A12). After defense counsel for both

petitioners had cross-examined Scott, the trial was adjourned until Monday morning. At that time, defense counsel informed the court that they did not wish to cross-examine Scott further. Petitioners did not seek a continuance but instead moved for a judgment of acquittal on all counts. In part, they argued that they had been prejudiced by Scott's change in testimony and that, if more time had been available, they would have been able to discredit his new story as they had his old (Pet. App. A15-A16). The district court dismissed the two "theft from interstate shipment" counts and took the remainder of petitioners' motions under advisement, pending the jury's verdict (Pet. App. A16).

ARGUMENT

1. With respect to the single wire fraud count on which the district court entered judgments of conviction, petitioners contend (Pet. 15-35) that the indictment was constructively amended at trial or, in the alternative, that there was a prejudicial variance between the indictment and the proof at trial. Neither argument is meritorious.

The wire fraud count on which petitioners were convicted (Count V of the indictment) is reprinted in its entirety on page 5 of the petition for certiorari. It incorporates by reference the description of petitioners' "scheme and artifice to defraud" contained in the first wire fraud count, Count II. That description alleged (see Pet. 6-7) that petitioners and Scott agreed to divert fuel oil from Paradee to Forte and

that, as part of the plan, Scott placed interstate telephone calls to petitioner Ashman to arrange the deliveries to Forte. Count V then alleged that one or more such calls were made on or about August 4, 1977, from Delaware to New Jersey. In its bill of particulars, the government alleged that the August 4 telephone calls in furtherance of the scheme to defraud Paradee related specifically to a load of fuel oil picked up by Scott at the Getty Oil Company in Delaware City, Delaware, on or about August 5, 1977, and delivered to Forte instead of Paradee. Several weeks before trial, the government furnished petitioners the purchase order and invoice allegedly pertaining to this delivery. As recounted above, however, during his redirect testimony at trial, Scott stated that, although he believed he did make a delivery of gasoline to Forte on August 5, the invoice for fuel oil obtained from Getty did not concern that delivery.

a. The indictment was not constructively amended at trial. When a court submits a case to the jury on a theory different from that stated in the indictment, the effect of the court's action may be treated as a constructive amendment to the indictment, even though there is no formal change in the indictment's language. In such cases, the reviewing court must inquire whether the theory on which the case was submitted to the jury differed with respect to an essential element of the offense and in a manner not fairly comprised within the charge returned by the grand jury. See, *e.g.*, *Stirone* v. *United States*,

361 U.S. 212 (1960). No such changed theory was involved here.

Petitioner was tried and convicted on the same charges that were returned by the grand jury. Neither the prosecutor nor the court in any way altered those charges before trial or before verdict, and the jury was properly instructed wholly in accordance with the allegations in the indictment (see A. 270a-277a). Indeed, during its charge, the district court read most of the indictment to the jury and then admonished the jurors to "[r]emember that [petitioners] are not on trial for any act or conduct which is not charged in the Indictment" (A. 297a). When the factfinder is given the case on the basis of the original indictment, as it was here, there is no fatal "amendment." See *Heisler* v. *United States*, 394 F.2d 692, 696 (9th Cir. 1968).

b. There was no impermissible variance between the indictment and the government's proof at trial. A variance arises when the evidence offered at trial proves facts different from those alleged in the indictment. *Berger* v. *United States*, 295 U.S. 78, 81 (1935); *Gaither* v. *United States*, 413 F.2d 1061, 1071-1072 (D.C. Cir. 1969). Unlike an amendment of the indictment, which is reversible error except in limited circumstances, a variance is subject to the application of the harmless error rule, Fed. R. Crim. P. 52(a), and thus results in reversal only if it affects the defendant's substantial rights. *Berger* v. *United States*, *supra*, 295 U.S. at 82; *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Schrenzel*, 462 F.2d 765 (8th Cir.), cert. denied, 409 U.S. 984 (1972); *United States* v. *Antonelli*, 439 F.2d 1068 (1st Cir. 1971); *United States* v. *Evans*, 398 F.2d 159 (3d Cir. 1968). See also Brief for the United States 31-32 n. 7, in *Dunn* v. *United States*, No. 77-6949 (June 4, 1979).

Here, the evidence showed, just as Count V charged, the making of telephone calls on or about August 4, 1977, in furtherance of a scheme to defraud Paradee of petroleum products that it should have received but that were delivered elsewhere. To the extent that Scott's testimony recounted deliveries of gasoline to Forte rather than deliveries of fuel oil as mentioned in the indictment's description of the scheme to defraud,[5] the variance was an immaterial one that did not alter the essential nature of the scheme to defraud and did not surprise or prejudice petitioners. As this Court has observed, "[t]he true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, *supra*, 295 U.S. at 82. Surprise and prejudice are the critical factors to be considered in making this judgment. *Id.* at 83; *United States* v. *Brozyna*, 571 F.2d 742 (2d Cir. 1978). Although petitioners assert (Pet. 22) that "[f]uel oil and gas-

[5] In view of the fact that Scott testified before the grand jury regarding diverted shipments of oil and diverted shipments of gasoline (A. 144a-159a), it is at least possible that the grand jury used the words "fuel oil" as a generic term embracing both substances.

oline in bulk are as different as apples and oranges," they have not explained in what way they were prejudiced or surprised solely by that distinction between Scott's testimony and the language of the indictment.

c. Through its bill of particulars and by furnishing the August 5 invoice to petitioners, the government indicated for the first time that its proof with respect to Count V would tie the August 4 telephone calls to a specific delivery to Forte. Petitioners now complain primarily because the evidence at trial showed that the delivery reflected on the invoice was not made to Forte and that the telephone calls related to a different delivery, probably one made at a different time on the same day. Petitioners are not entitled to relief because of this error in the bill of particulars.

Unlike an indictment returned by a grand jury, a bill of particulars prepared by a prosecutor may be amended at any time, and a court's decision to permit such an amendment is reversible only on a showing of prejudice or clear abuse of discretion. *United States* v. *Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979), quoting *United States* v. *Perez*, 489 F.2d 93, 95 (5th Cir. 1974). When, after a hearing to consider Scott's proposed redirect testimony regarding the dates and times on which he diverted gasoline to Forte (Tr. 812-833), the district court ruled that the government was not bound by the specific times reflected in the invoices, the court, in effect, allowed the government to amend its bill of particulars. As the court of appeals

stated in *United States* v. *Rivero*, 532 F.2d 450, 457 (5th Cir. 1976) (footnote omitted),

> the case is not * * * frozen in concrete [by the filing of a bill of particulars] as F.R. Crim. P. 7(f) recognizes. Nor is there any precise form in which the Judge has to allow the amendment. Considering the extended presentation of this matter both before the commencement [of] and during the trial, the Court's clear ruling after considered deliberation * * * was the equivalent of allowing the bill of particulars to conform to evidence of a weight permitting the jury to credit it beyond a reasonable doubt. We find no abuse of discretion in either the manner or the result.

The district court did not abuse its discretion here. The government plainly acted in good faith, as is evidenced by Scott's initial trial testimony confirming the allegations in the bill of particulars to the effect that the August 4 telephone calls were connected to the August 5 delivery reflected by the invoice. Petitioners' claims of prejudice are unpersuasive. As petitioners themselves observe (Pet. 25-27), their principal defense was to attempt to establish that Scott was lying by showing that his accounts of the deliveries he made were inaccurate. In petitioners' words (Pet. 27), "[t]his strategy was unarguably successful." Petitioners were not surprised or prejudiced by Scott's retraction of much of his earlier testimony or by his admission that he had lied. Nor was there any unfairness involved in Scott's continued insistence that he had made a delivery to

Forte around August 5, even though it was not the one reflected in the Getty Oil invoice. Petitioners were fully able to argue, as they did, that the changes in Scott's testimony and the vagueness of his final version rendered him unworthy of belief. Even now, petitioners have not proffered any evidence that they could have introduced, if given more time, to demonstrate that Scott did not make a delivery of fuel to them "on or about" August 5. The district court correctly held (Pet. App. A27-A28) that petitioners' bare assertion that, " 'if given the opportunity, [they] could have been equally successful in disproving Scott's amended allegations' " did not constitute a showing of actual prejudice. In the court's words (*ibid.*),

> [petitioners] are asking the Court to assume, seven weeks after trial, that more time spent investigating documentary records readily available to the defense would (1) produce additional evidence for use in impeaching Scott and (2) that such additional evidence would have materially increased the defense's ability to discredit Scott. This is not a case where the development of the trial makes prejudice to the defense apparent and, in the absence of some record basis, I refuse to make the assumptions which [petitioners'] argument requires.

Finally, as the district court also observed (Pet. App. A28-A29), defense counsel did receive a continuance from Saturday afternoon, July 15, until Monday morning, July 17, to decide whether they were satisfied with the record as it stood after Scott's

testimony on redirect or whether they believed further investigation was necessary. When trial resumed on Monday morning, petitioners did not continue their cross-examination of Scott, and they did not request additional time to prepare a response to Scott's revised testimony. It must therefore be assumed that they "made a deliberate tactical decision not to ask for a continuance and to go to the jury on what can accurately be described as a withering and effective cross-examination," thereby denying the government time "to regroup and find additional records tending to support Scott's new story" (Pet. App. A28).

2. Petitioners contend (Pet. 35-40) that the evidence was insufficient to sustain their convictions on Count V because the government did not prove that Scott spoke to Ashman during the August 4 telephone calls. As the district court noted (Pet. App. A20 n.*), however, defense counsel conceded on July 17, 1978, that there was sufficient evidence to go to the jury on Count V, and petitioners should not be permitted to retract that concession in this Court.

In any event, viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), the evidence was sufficient to support petitioners' convictions on Count V. Paul Scott, whose testimony was corroborated by telephone company toll records (Govt. Exhs. 17, 19), stated that on the afternoon of August 4, 1977—before a load of illegally diverted gasoline was delivered to Forte Oil—he placed two telephone calls from his residence

in Dover, Delaware, to petitioner Ashman's residence in Blackwood, New Jersey. Scott further testified that the calls were related to the scheme to defraud Paradee (Tr. 218-219). In addition, Scott stated that, within minutes of his interstate calls to Ashman's residence, he made an intrastate telephone call at 2:07 p.m., and at 2:14 p.m. he called unindicted co-conspirator Randy Dickerson in Camden, New Jersey (Tr. 219-220; Govt. Exh. 17). Petitioner Jock's attorney inquired whether "these various telephone calls on [August 4, 1977] * * * with various parties were all with regard to the delivery of either fuel oil or gasoline to Forte Oil," and Scott unequivocally replied, "That's correct" (Tr. 233). In light of this testimony, the district court correctly ruled (Pet. App. A20) that there was more than sufficient evidence to sustain petitioners' convictions on Count V.

Whether or not Ashman was present at his house when Scott called on August 4 is not dispositive. The jury could infer, from the fact of the telephone calls, that Scott either spoke with or left messages for Ashman, who was waiting when Scott made his next delivery and who paid Scott $2400 in cash at that time (Tr. 165-169, 584-585, 635). This inference is supported by Scott's testimony that he had one or two telephone conversations with Ashman before each delivery, that the calls related to whether Ashman would meet him at Forte Oil, and that he would not

deliver fuel unless he had first made arrangements to do so (Tr. 209-210, 854-855, 859-860).[6]

3. Petitioners contend finally (Pet. 40-46) that the trial judge erred in denying their motion under Fed. R. Crim. P. 33 for a new trial based on newly discovered evidence. The allegedly new evidence on which petitioners rely includes the following: (1) Ashman's personal work diary, which indicated that he was at the SuCrest Company in Brooklyn, New York, on the afternoon of August 4, 1977 (A. 238a); (2) Ashman's wife's personal diary entry for August 4, 1977, which indicated that her husband arrived home at 6:30 p.m. in the evening (A. 237a); (3) business records from the SuCrest Company that showed Ashman's truck was loaded in Brooklyn, New York, at 1:23 p.m. on August 4 (A. 235a, 239a, 240a); and (4) documents from Ashman's employer, the Shanahan Trucking Company of Camden, New Jersey, that indicated he was sent to New York on August 4 (A. 236a). Petitioners suggest that this evidence shows that Ashman could not have received the August 4 telephone calls from Scott.

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[6] Of course, it is not an essential element of a wire fraud violation that the defendant himself have used an interstate wire facility; he commits the offense if he causes an interstate wire communication to be made, or if such a communication is a foreseeable result of his scheme. See, *e.g.*, *United States* v. *Corey*, 566 F.2d 429, 430-431 n.2 (2d Cir. 1977); *United States* v. *Conte*, 349 F.2d 304 (6th Cir.), cert. denied, 382 U.S. 926 (1965). Cf. *Pereira* v. *United States*, 347 U.S. 1 (1954) (mail fraud).

A new trial will be granted on the ground of newly discovered evidence only if the defendant shows that the evidence was discovered after the trial, that he could not have discovered the evidence with due diligence prior to or during the trial, that the evidence is material and not merely cumulative or impeaching, and that a new trial would probably produce a different result. *United States* v. *Carter*, 549 F.2d 1164 (8th Cir.), cert. denied, 430 U.S. 974 (1977); *United States* v. *Riley*, 544 F.2d 237 (5th Cir. 1976), cert. denied, 430 U.S. 932 (1977); *United States* v. *Maestas*, 523 F.2d 316 (10th Cir. 1975). Moreover, a motion for a new trial under Rule 33 is addressed to the sound discretion of the trial judge. *United States* v. *Carter, supra; United States* v. *Riley, supra.* There was no abuse of discretion in this case.

The district court properly found that the evidence offered by petitioners either was not newly discovered or could have been discovered through due diligence prior to trial. As the court observed (Pet. App. A34), Count V of the indictment alleged the occurrence of interstate telephone communications in furtherance of the fraudulent scheme on or about August 4, 1977, and before trial petitioners received toll call records indicating that the only calls on that date between the residences of Scott and Ashman occurred at 2:02 p.m. and 2:04 p.m. There was therefore no reason for petitioners to assume, as they now say they did (Pet. 43-44), that the relevant calls were in the evening or that Ashman's location during the afternoon of August 4 was immaterial.

The court also correctly noted (Pet. App. A35-A37) that evidence that Ashman may have been in New York City during the afternoon of August 4 does not necessarily show that Scott lied with respect to the August 4 telephone calls. Scott did not testify that he spoke to Ashman directly during the calls (Pet. App. A36 n.**), and as suggested above, it is entirely possible that Scott left messages for Ashman with respect to an imminent delivery of stolen gasoline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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